UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

McDonough Properties, L.L.C. **M & R Holdings, L.L.C.,** **Tri-D, L.L.C., and** **Col. Frank Barnett** **COMPLAINANTS** **V.** **City of Wetumpka,** **RESPONDENT**	**Docket No. 16-12-11**

DIRECTOR'S DETERMINATION

I. INTRODUCTION

This matter is before the Federal Aviation Administration (FAA) based on a formal complaint filed in accordance with the FAA Rules of Practice for Federally Assisted Airport Proceedings (FAA Rules of Practice), Title 14 Code of Federal Regulations (CFR), Part 16.[1]

McDonough Properties, L.L.C., M & R Holdings, Tri-D, L.L.C. and Col. Frank Barnett, (Complainants) have filed a formal complaint pursuant to Title 14 CFR, Part 16 against the City of Wetumpka, Alabama, (Respondent) owner, sponsor, and operator of the Wetumpka Municipal Airport (Airport).

Complainants allege that the Respondent violated Grant Assurance 5, *Preserving Rights and Powers;* Grant Assurance 19, *Operation and Maintenance;* Grant Assurance 22, *Economic Nondiscrimination;* Grant Assurance 23, *Exclusive Rights;* Grant Assurance 24, *Fee and Rental Structure* and Grant Assurance 38, *Hangar Construction.* The Complainants' claim that the Respondent engaged in economic discrimination by failing to provide a rental structure which makes the airport self-sustaining and that the Respondent took actions which operated to deprive it of its rights and powers.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the FAA

[1] Enforcement procedures regarding airport compliance matters may be found at *FAA Rules of Practice for Federally Assisted Airport Enforcement Proceedings* (14 CFR, Part 16). These enforcement procedures were published in the Federal Register (61 FR 53998, October 16, 1996) and became effective on December 16, 1996.

finds the Respondent is currently not in violation of its Federal obligations with respect to Grant Assurance 5, *Preserving Rights and Powers;* Grant Assurance 19, *Operation and Maintenance;* Grant Assurance 22, *Economic Nondiscrimination;* Grant Assurance 23, *Exclusive Rights;* Grant Assurance 24, *Fee and Rental Structure* and Grant Assurance 38, *Hangar Construction.* The FAA's decision in this matter is based on applicable Federal law and FAA policy, review of the pleadings and supporting documentation submitted by the parties and reviewed by the FAA, which comprises the administrative record reflected in the attached FAA Index.

With respect to the allegations presented in this Complaint, under the specific circumstances at the Airport as discussed below and based on the evidence of record in this proceeding, the Director finds the Respondent is currently not in violation of its Federal obligations.

II. THE PARTIES

Airport

The Wetumpka Municipal Airport (08A or Airport) is a public-use, nontowered airport owned and operated by the City of Wetumpka, Alabama. The 312-acre facility is located six nautical miles west of Wetumpka, Alabama. It has 82-based aircraft with 108 average daily aircraft operations and the hangar facilities at the airport include 5 T-hangars consisting of approximately 50 units, 10 enclosed hangars, 8 open hangars, and 9 larger corporate/business hangars. The Airport had 39,400 operations for the 12-month period ending November 2012. It has one fixed base operator currently operating out of one of the Respondent's airport office buildings. [FAA Item 1 pages 5 and 6] The airport has two runways including a paved runway approximately 3000 feet long and a turf runway approximately 2800 feet long. [FAA Item 7 page 3] The development of the Airport has been financed, in part, with discretionary and entitlement funds provided to the City as the Airport sponsor under the Airport Improvement Program (AIP), authorized by the Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C., § 47101, *et seq.* As a result the City is obligated to comply with the FAA sponsor assurances and related Federal law, 49 U.S.C., § 47101. The last grant awarded at the time of the Complaint in 2012, was for $135,523. The City is also bound by a Quitclaim Deed issued pursuant to the Surplus Property Act of 1944, codified as 49 U.S.C., §§ 47151 through 47153.

Complainants

The Complainants, for the relevant time period, were tenants and are users of the Wetumpka Municipal Airport.

McDonough Properties, L.L.C. (McDonough) owns a large hangar at the airport and is managed by David Ramsey (Ramsey and McDonough may be used interchangeably) and McDonough owns 3 aircraft. McDonough is a hold-over tenant; his lease expired on September 30, 2007. [FAA Item 1, page 3]

M & R Holdings, L.L.C. (M & R) is managed by Roger Kemp, who owns a large hangar and has been a hangar tenant at the airport since June, 2003. M & R is under an existing lease that had not expired when this Complaint was filed. M&R owns one aircraft. [FAA Item 1, page 3]

Tri-D, L.L.C. (Tri-D) is owned by Theresa Harvey and managed by her husband Richard Chaput. Tri-D has been a hangar tenant at the airport since July 1995. Tri-D is a hold-over tenant; its lease expired December 31, 2011. Tri-D has one aircraft located at its hangar. [FAA Item 1, page 3]

Frank Barnett (Barnett) leases a large hangar and has been a tenant at the airport since March 2010. Mr. Barnett is constructing an aircraft located at his hangar. Barnett's lease expired on January 1, 2011. [FAA Item 1, page 3]

III. BACKGROUND AND PROCEDURAL HISTORY

Factual Background

McDonough Lease

McDonough became the successor in interest to a ground lease beginning in February 1996, with the original lease commencing on October 1, 1992. The hangar was constructed in mid-1970. The term of the original lease stipulated an initial ten-year term followed by five-year renewal periods *"on such terms as the parties hereto shall agree upon."* In 2002, the Respondent renewed McDonough's lease for an additional five years. In 2007, the Respondent rejected the second five-year renewal. Subsequently, the Respondent presented a new lease to McDonough containing a five-year initial term with the option for two, five-year renewals. McDonough objected to certain provisions in the lease including the five-year term of the lease, the forfeiture provision requiring termination of the lease in the event lessee received a felony conviction, and the attorney fee provision. The parties exchanged many letters on these issues but could not resolve the issues of the lease term and the felony conviction provision. [FAA Item 1, pages 14 and 15] McDonough continues to occupy the hangar and became a holdover tenant in 2007.

McDonough filed a Part 13 informal complaint on December 19, 2007, with the FAA Airports District Office (ADO) in Jackson, Mississippi. The Part 13 complaint raised the issues of the forfeiture for felony conviction clause and the lease term. [FAA Item 1, page 15]

On July 22, 2011, the FAA ADO responded to Mr. McDonough's attorney, Wade Ramsey. The ADO stated that the lease term was reasonable based on the facts of this particular lease. The ADO also requested that the Respondent review the lease and ensure that the lease term offered was reasonable and consistent with the other leases on the airfield. The ADO agreed that the forfeiture provision must be modified. [Item 1, page 14 and Exhibit 27]

On September 9, 2011, the ADO, by letter, informed the Respondent of its response to Mr. Ramsey and requested that the Respondent continue its efforts to resolve the issues with Mr. McDonough. [FAA Item 1, page 15 and Exhibit 28]

On August 22, 2011, the Respondent, by email, requested additional time to resolve the McDonough lease due to the Respondent's ongoing effort to develop a New Standard Lease. [FAA Item 1, page 15]

On December 6 and 30, 2011, the Respondent attorney received emails from the City of Wetumpka, Public Works Director, providing information regarding sample hangar rates in the local area. [Item 7, Exhibit 7]

On December 19, 2011, the Respondent adopted Ordinance No. 2011-15 approving a New Standard Lease, pending the outcome of Feasibility Study to determine growth options for the airport.[2] [FAA Item 7, Exhibit 4]

On December 22, 2011, the Respondent notified the FAA by letter that it had adopted a New Standard Lease for commercial operators, and that the New Standard Lease would temporarily have a one-year term during the pendency of the Feasibility Study. [Item 7, Exhibit 3]

On December 21, 2011, the Respondent informed Mr. Ramsey by letter that the Respondent had adopted a new Airport Minimum Standards Code, Airport Rules and Regulations Code, and New Standard Leases for the Airport. The letter also included a copy of the lease for McDonough to execute and requested that payment be made for the back rent total listed in the letter. [FAA Item 1, Exhibit 28]

On or about December 29, 2011, McDonough hand delivered a check for back rent to the Respondent, but McDonough did not execute the New Standard Lease. [FAA Item 1, page 15]

On January 24, 2012, Ramsey communicated with the Respondent requesting a meeting regarding the one year term proposed in the New Standard Lease. [FAA Item 1, page 16]

On January 27, 25, and 24, 2012, respectively, the Respondent served Notice of Termination of Tenancy and Notice to Vacate and Remove Personal Property on McDonough, Tri-D, and Barnett. [FAA Item 1, page 16 and Exhibits 34 and 36]

On February 3, 2012, Ramsey requested by letter that the Respondent negotiate with McDonough.

On March 2, 2012, the Respondent responded to the request, stating the Respondent did not wish to renegotiate the New Standard Lease. [FAA Item 1, page 16 and Exhibit 18]

On March 2, 2012, Ramsey received a letter from the Respondent stating that the Respondent calculated the back rent inaccurately and included a check for the overpaid amount. [FAA Item 1, page 17 and Exhibit 41]

On March 23, 2012, by letter Ramsey returned to the Respondent the refunded rent check with the explanation that the check was for the amount requested by the Respondent and covered rent through November 30, 2012. [FAA Item 1, Exhibit 42]

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[2] The forfeiture clause for a felony conviction that Complainant objected to in the lease agreement offered in 2007 was modified in the New Standard Lease to require forfeiture of the lease if the felony conviction affect the ability of the lessee to carry out their obligations under the lease agreement. The Complainant did not object to this provision in the New Standard Lease.

On May 12, 2012, Ramsey on behalf of all the Complainants filed a rebuttal to the Respondent's response to the Part 13 Informal Complaint. [FAA Item 1, page 18 and Exhibit 43]

On August 7, 2012, McDonough made a preliminary application for a loan to make improvements on his hangar. [FAA Item 1, page 17]

On August 23, 2012, the bank responded to his inquiry stating that the loan maturity date could not exceed the date of the termination of the lease. [FAA Item 1, page 17 and Exhibit 65]

TRI-D Lease

On August 7, 2006, Tri-D signed a lease with the Respondent providing for a 5-year lease, term expiring August 7, 2011, with two, five-year renewal periods. [FAA Item 1, page 18 and Exhibit 45]

Tri- D sought to exercise the first, five-year lease renewal option and the Respondent declined to renew the lease, informing Tri-D that the Respondent had adopted a New Standard Lease with a one year term. [FAA Item 1, pages 18 and 19]

On January 25, 2012, the Respondent by letter provided Tri-D with a Notice of Termination of Tenancy and Notice to Vacate and Remove Personal Property. The Respondent has not sought to enforce the eviction notice. [FAA Item 1, page 19 and Exhibit 34]

Tri-D attempted to pay rent due on February 4, 2012. On February 13, 2012, the Respondent informed Tri-D by letter that it received the past due rent check and the Respondent would hold the check pending the receipt of the signed lease and a current copy of Tri-D's insurance. [FAA Item 1, page 19 and Exhibit 38]

On February 24, 2012, the Respondent returned the check to Tri-D based on the failure of Tri-D to sign the lease. Tri-D was given until March 26, 2012, to vacate the premises. The Respondent has not sought to enforce the eviction notice. [FAA Item 1, page 19 and Exhibit 35, 35a]

On May 12, 2012, Tri-D joined the other Complainants in filing a Part 13 Informal Complaint. [FAA Item 1, page 19 and Exhibit 43]

On or about August 9, 2012, Tri-D made an inquiry for a loan from a financial institution. The credit union responded, stating that a loan would have to be paid off prior to the expiration of the lease. [FAA Item 1, page 19]

BARNETT Lease

On March 15, 2010, the Respondent approved the assignment of a lease from Lt. Col. Alexander H. C. Harwick to Barnett commencing April 10, 2007. The lease expired on January 1, 2011. The lease provided that the lease "*must be renewed subject to negotiations of such terms as the CITY may fix.*" [FAA Item 1, page 20 and Exhibit 9]

On October 3, 2010, Barnett informed the Respondent of his intent to renew the lease for his hangar. [FAA Item 1, page 20 and Exhibit 26]

On May 12, 2012, Barnett joined the other Complainants in filing a Part 13 Informal Complaint. [FAA Item 1, page 20 and Exhibit 43]

On August 16, 2012, Barnett informed the Respondent by letter that under the terms of the lease he was invoking the option to renew. [FAA Item 1, page 20 and Exhibit 65]

M & R Lease

On June 16, 2003, the Respondent entered into a lease agreement for a ten-year term with Dr. Roger Kemp, the principal of M & R, for airport property with an existing hangar. The lease expires on or about June 16, 2013, and provided for two renewal periods of five years. [FAA Item 1, page 21 and Exhibit 3]

On May 12, 2012, M & R joined the other Complainants in filing a Part 13 informal complaint. [FAA Item 1, page 21 and Exhibit 43]

In August 2012, M & R made a loan inquiry at its financial institution. The response to the inquiry was that a loan would be denied based on the short term of the lease. [FAA Item 1, page 21]

Airport tenants

The relevant airport tenants consist of nine Commercial Operators. Six of these tenants are operating under valid leases. [FAA Item 1, page 6] There are three, hold-over tenants operating under an expired lease.

The tenants operating under valid leases at the time the Complaint was filed are:

- Arrowhead Plastics Engineering, Inc., assumed its lease effective July 6, 1989, and the lease was extended on October 5, 2009 for a period of five years set to expire on August 31, 2014. [FAA Item 7, page 7]
- Brett Curenton's (Curenton) lease became effective on June 6, 2003, and will expire on June 15, 2013. [FAA Item 7, page 6 and Item 1, Exhibit 4]
- M & R entered into a lease on June 16, 2003, for a term of ten years, with an expiration date of June 15, 2013. [FAA Item 7, page 9]
- AirEvac's, lease expired on February 28, 2011, and the New Standard Lease for a one-year term was executed for a term beginning January 1, 2012, with an expiration date of December 31, 2012. [FAA Item 7, page 6]
- Mike Albertson's lease expired on December 31, 2011, and the New Standard Lease was executed for a one-year term expiring on December 31, 2012.
- Moffet's lease expired on December 31, 2011, and the New Standard Lease was executed for a one-year term expiring on December 31, 2012.

The tenants that failed to sign the New Standard Lease and do not have valid leases are:

- Tri-D's lease expired December 31, 2011, and it is currently a holdover tenant. [FAA Item 7, page 10]
- Frank Barnett's lease expired on January 1, 2011, and he is currently a holdover tenant. [FAA Item 7, page 9]
- McDonough's lease expired on September 30, 2007. McDonough and the Respondent engaged in lease negotiations at that time regarding a dispute over the proposed five-year lease term and other provisions in the lease. They were unable to agree to the term. McDonough has been a holdover tenant since 2007. [FAA Item 7, page 9]

The Respondent approved the New Standard Lease with a one-year lease term in November 2011. The tenants currently under a lease with terms longer than a year are operating under preexisting leases.

Procedural History

The Complainants filed a Part 16 Formal Complaint dated August 28, 2012 (including Exhibits 1-70), alleging the Respondent violated 49 U.S.C., §47107(a) and airport Grant Assurances 5, 19, 22, 23, 24 and 38. [FAA Item 1]

On September 17, 2012, the FAA issued the Notice of Docketing. [FAA Item 4]

Dated August 31, 2012, the Complainants filed the First Amended Complaint. [FAA Item 5]

Dated October 1, 2012, Respondent filed Respondent's Unopposed Motion of the City of Wetumpka for an Extension of Time to File Answer. [FAA Item 6]

Dated October 22, 2012, Respondent filed the Answer to the Complaint and Motion to Dismiss. [FAA Item 7]

Dated October 31, 2012, Complainants' Motion for Extension of Time to File a Reply and Answer to the Motion to Dismiss. [FAA Item 8]

Dated November 9, 2012, Complainant filed Complainants' Reply to the Respondent's Answer and Response to the Respondent's Motion to Dismiss, including Complainants' Amended Exhibits 1-79. [FAA Item 9]

ISSUES

Upon review of the allegations and the relevant airport-specific circumstances summarized above, the FAA has determined that the following issues require analysis to provide a complete review of the Respondent's compliance with applicable Federal law and policy:

- **Whether the Respondent is in violation of Grant Assurance 5, *Preserving Rights and Powers,* in failing to make the airport as self-sustaining as possible under existing circumstances.**

- **Whether the Respondent is in violation of Grant Assurance 8, *Consultation with Users,* in failing to allow adequate participation by airport users.**

- **Whether the Respondent is in violation of Grant Assurance 19, *Operation and Maintenance,* in failing to operate the Airport in a safe and serviceable condition as required by the FAA.**

- **Whether the Respondent engaged in disparate treatment in violation of Grant Assurance 22, *Economic Nondiscrimination,* in implementing a New Standard Lease that only allowed a one-year lease term.**

- **Whether the Respondent is in violation of Grant Assurance 23, *Exclusive Rights*, 49 U.S.C., § 40103(e) and 49 U.S.C., § 47107(a)(4), in allowing tenants Arrowhead and Curenton to retain a long term lease while denying that right to Complainants.**

- **Whether the Respondent is in violation of Grant Assurance 24, *Fee and Rental Structure* in implementing a short term lease structure.**

- **Whether the Respondent is in violation of Grant Assurance 38, *Hangar Construction*, U.S.C., § 47107(a)(21) in refusing to grant long term leases.**

V. APPLICABLE FEDERAL LAW AND FAA POLICY

The Federal role in civil aviation has been augmented by various legislative actions that authorize programs for providing Federal funds and other assistance to local communities for the development of airport facilities. In each such program, the airport sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely and efficiently and in accordance with specified conditions. Commitments assumed by airport sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public fair and reasonable access to the airport.

The following is a discussion pertaining to the Airport Improvement Program, Airport Sponsor Assurances, the FAA Airport Compliance Program, and enforcement of Airport Sponsor Assurances.

The Airport Improvement Program

Title 49 U.S.C., § 47101, *et seq*., provides for Federal airport financial assistance for the development of public-use airports under the Airport Improvement Program (AIP) established by

the Airport and Airway Improvement Act of 1982, (AAIA) as amended. Title 49 U.S.C., § 47107, *et seq.*, sets forth assurances to which an airport sponsor agrees as a condition of receiving Federal financial assistance. Upon acceptance of an AIP grant, the assurances become a binding contractual obligation between the airport sponsor and the Federal Government. The assurances made by airport sponsors in AIP grant agreements are important factors in maintaining a viable national airport system.

Airport Sponsor Assurances

As a condition precedent to providing airport development assistance under AIP, 49 U.S.C., § 47107, *et seq.*, the Secretary of Transportation and, by extension, the FAA must receive certain assurances from the airport sponsor. Title 49 U.S.C., § 47107(a) sets forth the statutory sponsorship requirements to which an airport sponsor receiving Federal financial assistance must agree.

The FAA has a statutory mandate to ensure that airport owners comply with these sponsor assurances.[3] FAA Order 5190.6B, *FAA Airport Compliance Manual* (Order), issued on September 30, 2009, provides the policies and procedures to be followed by the FAA in carrying out its legislatively mandated functions related to compliance with Federal obligations of airport sponsors. The FAA considers it inappropriate to provide Federal assistance for improvements to airports where the benefits of such improvements will not be fully realized due to inherent restrictions on aeronautical activities.

The FAA grant assurances that apply to the circumstances set forth in this Complaint include: (1) Grant Assurance 5, *Preserving Rights and Powers*; (2) Grant Assurance 19, *Operation and Maintenance;* (3) Grant Assurance 22, *Economic Nondiscrimination;* (4) Grant Assurance 23, *Exclusive Rights; (5)* Grant Assurance (24), Fee and Rental Structure; and (6) Grant Assurance 38, *Hangar Construction.*

Grant Assurance 5, Preserving Rights and Powers

Grant Assurance 5, *Preserving Rights and Powers*, (Grant Assurance 5) requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. This assurance implements the provisions of the AAIA, 49 U.S.C., § 47107(a), et seq:

Assurance 5 requires, in pertinent part, that the sponsor of a federally obligated airport:

> *...will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by*

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[3] *See, e.g.*, the Federal Aviation Act of 1958, as amended and recodified, Title 49 U.S.C., §§ 40101, 40113, 40114, 46101, 46104, 46105, 46106, 46110; and the Airport and Airway Improvement Act of 1982, as amended and recodified, Title 49 U.S.C., §§ 47105(d), 47106(d), 47107(k), 47107(l), 47111(d), 47122.

the sponsor. This shall be done in a manner acceptable to the Secretary. [Grant Assurance 5]

Grant Assurance 19, *Operation and Maintenance*

Grant Assurance 19, *Operation and Maintenance*, implements the provisions of the AAIA, 49 U.S.C., § 47107(a)(7), and requires, in pertinent part, that the sponsor of a federally-obligated airport assure:

> *The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state, and local agencies for maintenance and operation. It will not cause or permit any activity or action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for:*
> *(1) Operating the airport's aeronautical facilities whenever required;*
> *(2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and,*
> *(3) Promptly notifying airmen of any condition affecting aeronautical use of the airport.*
>
> *Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.*

Additionally, FAA Order 5190.6B provides that the owner should adopt and enforce adequate rules, regulations, or ordinances as necessary to ensure safety and efficiency of flight operations and to protect the public using the airport. In fact, the prime requirement for local regulations is to control the use of the airport in a manner that will eliminate hazards to aircraft and to people on the ground. As in the operation of any public service facility, FAA advises airport sponsors to establish adequate rules covering, *inter alia*, vehicular traffic, sanitation, security, crowd control, access to certain areas, and fire protection. [*See,* FAA Order 5190.6B, Chapter 7 Airport Operation, section 7.9]

Grant Assurance 22, *Economic Nondiscrimination*

Grant Assurance 22, *Economic Nondiscrimination*, requires the owner of any airport developed with Federal grant assistance to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity on fair and reasonable terms, and without unjust discrimination. Grant Assurance 22 deals with both the reasonableness of airport access and the prohibition of adopting unjustly discriminatory conditions as a potential for limiting access. Grant Assurance 22 implements the provisions of 49 U.S.C., § 47107(a) (1) through (6), and requires, in pertinent part, that the sponsor of a federally obligated airport:

> *...will make its airport available as an airport for public use on reasonable terms, and without unjust discrimination, to all types, kinds, and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.* [Grant Assurance 22(a)]
>
> *...may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport.* [Grant Assurance 22(h)]
>
> *...may...limit any given type, kind, or class of aeronautical use of the airport if such action is necessary for the safe operation of the airport or necessary to serve the civil aviation needs of the public.* [Grant Assurance 22(i)]

Subsection (h) qualifies subsection (a), and subsection (i) represents an exception to subsection (a) to permit the sponsor to exercise control of the airport sufficient to preclude unsafe and inefficient conditions that would be detrimental to the civil aviation needs of the public.

In all cases involving restrictions on airport use imposed by airport owners for safety and efficiency reasons, the FAA will make the final determination on the reasonableness of such restrictions when those restrictions deny or limit access to, or use of, the airport. [*See* FAA Order 5190.6B, ¶14.3]

FAA Order 5190.6B describes the responsibilities under Grant Assurance 22 assumed by the owners or sponsor of public use airports developed with Federal assistance. Among these is the obligation to treat in a uniform manner those users making the same or similar use of the airport and to make all airport facilities and services available on reasonable terms without unjust discrimination. [*See* FAA Order 5190.6B, Chapter 9]

The owner of an airport developed with Federal assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activities on reasonable terms and without unjust discrimination. [*See* FAA Order 5190.6B, ¶9.1.a]

Grant Assurance 23, *Exclusive Rights*

Grant Assurance 23, *Exclusive Rights*, (Grant Assurance 23) implements the provisions of 49 U.S.C., §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> *...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.*
>
> *...will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...*

In FAA Order 5190.6B, *FAA Airport Compliance Manual*, the FAA discusses its exclusive rights policy and broadly identifies aeronautical activities as subject to the statutory prohibition against exclusive rights. While public-use airports may impose qualifications and minimum standards upon those who engage in aeronautical activities, FAA has taken the position that the application of any unreasonable requirement or any standard that is applied in an unjustly discriminatory manner may constitute the constructive grant of an exclusive right. Courts have found the grant of an exclusive right where a significant burden has been placed on one competitor that is not placed on another. *[See e.g. Pompano Beach v FAA, 774 F2d 1529 (11th Cir, 1985)]*

Leasing all available airport land and improvements planned for aeronautical activities to one enterprise will be construed as evidence of intent to exclude others unless it can be demonstrated that the entire leased area is presently required and will be immediately used to conduct the activities contemplated by the lease. [*See* Order, Sec. 8.9.d *Space Limitation.*]

FAA Order 5190.6B provides additional guidance on the application of the statutory prohibition against exclusive rights and FAA policy regarding exclusive rights at public-use airports. [*See* Order, Chapter 8.]

Grant Assurance 24, *Fee and Rental Structure*

Grant assurance 24, *Fee and Rental Structure*, addresses fees the owner or sponsor levies on airport users in exchange for the services the airport provides.

Section 47107(a)(13) of 49 U.S.C., requires, in pertinent part, that the owner or sponsor of a federally obligated airport "will maintain a fee and rental structure for the facilities and services being provided to airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport." In addition, under § 47107(a), fees levied on aeronautical activities must be reasonable and not unjustly discriminatory.

Grant Assurance 24 satisfies the requirements of § 47107(a)(13). It provides, in pertinent part, that the owner or sponsor of a federally-obligated airport agrees that it will maintain a fee and rental structure consistent with Grant Assurances 22, *Economic Nondiscrimination*, and 23, *Exclusive Rights.* The airport owner or sponsor agrees to establish a fee and rental structure that

will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. The intent of the assurance is for the airport operator to charge fees that are sufficient to cover as much of the airport's costs as is feasible.

Moreover, FAA Order 5190.6B, *Airport Compliance Requirements*, states that the owner or sponsor's obligation to make an airport available for public use does not preclude the owner or sponsor from recovering the cost of providing the facility. The owner or sponsor is expected to recover its costs through the establishment of fair and reasonable fees, rentals, or other user charges that will make the airport as self-sustaining as possible under the circumstances existing at the particular airport. [*See* Order, 4-14(a).]

Grant Assurance 38, *Hangar Construction*

Section 47107(a) (21) of 49 U.S.C., requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> *...and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.*

The FAA Airport Compliance Program

The FAA discharges its responsibilities for ensuring airport owners' compliance with their Federal obligations through its Airport Compliance Program. The FAA's airport compliance efforts are based on the contractual obligations an airport owner accepts when receiving Federal grant funds or the transfer of Federal property for airport purposes. These obligations are incorporated in grant agreements and instruments of conveyance in order to protect the public's interest in civil aviation and to ensure compliance with Federal laws.

The FAA Airport Compliance Program is designed to ensure the availability of a national system of safe and properly maintained public-use airports operated in a manner consistent with the airport owners' Federal obligations and the public's investment in civil aviation.

The Airport Compliance Program does not control or direct the operation of airports. Rather, it monitors the administration of the valuable rights pledged by airport sponsors to the people of the United States in exchange for monetary grants and donations of Federal property to ensure that the public interest is being served. FAA Order 5190.6B sets forth policies and procedures for the FAA Airport Compliance Program. The Order establishes the policies and procedures to be followed by FAA personnel in carrying out the FAA's responsibilities for ensuring airport compliance. It provides basic guidance for FAA personnel in interpreting and administering the various continuing commitments made to the United States by airport owners as a condition of receiving a grant of Federal funds or the conveyance of Federal property for airport purposes. The Order analyzes the various obligations set forth in the standard airport sponsor assurances, addresses the nature of those assurances, addresses the application of those assurances in the

operation of public-use airports, and facilitates interpretation of the assurances by FAA personnel.

The FAA Compliance program is designed to achieve voluntary compliance with Federal obligations accepted by owners and/or operators of public-use airports developed with FAA-administered assistance. Therefore, in addressing allegations of noncompliance, the FAA will make a determination as to whether an airport sponsor is *currently* in compliance with the applicable Federal obligations. Consequently, the FAA will consider the successful action by the airport to cure any alleged or potential past violation of applicable Federal obligation to be grounds for dismissal of such allegations. [*See e.g. Wilson Air Center v. Memphis and Shelby County Airport Authority, FAA Docket No. 16-99-10, (8/30/01) Wilson Air Center, LLC v FAA, 372 F.3d 807 (6th Cir. 2004)]*

FAA Enforcement Responsibilities

The Federal Aviation Act of 1958, as amended (FAAct), 49 U.S.C., § 40101, et seq., assigns the FAA Administrator broad responsibilities for the regulation of air commerce in the interests of safety, security, and development of civil aeronautics. The Federal role in encouraging and developing civil aviation has been augmented by various legislative actions, which authorize programs for providing funds and other assistance to local communities for the development of airport facilities. In each such program, the airport owner or sponsor assumes certain obligations, either by contract or by restrictive covenants in property deeds and conveyance instruments, to maintain and operate its airport facilities safely, efficiently, and in accordance with specified conditions. Commitments assumed by airport owners or sponsors in property conveyance or grant agreements are important factors in maintaining a high degree of safety and efficiency in airport design, construction, operation and maintenance, as well as ensuring the public reasonable access to the airport. Pursuant to 49 U.S.C., § 47122, the FAA has a statutory mandate to ensure that airport owners comply with their Federal grant assurances.

The Complaint Process

Pursuant to 14 CFR, Part 16, § 16.23, a person directly and substantially affected by any alleged noncompliance may file a complaint with the FAA. The complainant shall provide a concise but complete statement of the facts relied upon to substantiate each allegation. The complaint shall also describe how the complainant was directly and substantially affected by the things done or omitted by the respondents. [14 CFR, Part 16, § 16.23(b) (3, 4)]

If, based on the pleadings, there appears to be a reasonable basis for further investigation, the FAA will investigate the subject matter of the complaint. In rendering its initial determination, the FAA may rely entirely on the complaint and the responsive pleadings provided. Each party shall file documents it considers sufficient to present all relevant facts and arguments necessary for the FAA to determine whether the sponsor is in compliance. [14 CFR, Part 16, § 16.29]

The proponent of a motion, request, or order has the burden of proof. A party who has asserted an affirmative defense has the burden of proving the affirmative defense. This standard burden of proof is consistent with the Administrative Procedure Act (APA) and Federal case law. The

APA provision states, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." [5 U.S.C., § 556(d).] [*See also, Director, Office of Worker's Compensation Programs, Department of Labor v. Greenwich Collieries, 512 US 267, 272 (1994); Air Canada et al. v. Department of Transportation, 148 F3d 1142, 1155 (DC Cir, 1998).*] Title 14 CFR, § 16.229(b) is consistent with 14 CFR, § 16.23, which requires that the complainant must submit all documents then available to support his or her complaint. Similarly, 14 CFR, § 16.29 states that "[e]ach party shall file documents that it considers sufficient to present all relevant facts and argument necessary for the FAA to determine whether the sponsor is in compliance."

Title 14 CFR, § 16.31(b-d), in pertinent parts, provides that "(t)he Director's determination will set forth a concise explanation of the factual and legal basis for the Director's determination on each claim made by the complainant. A party adversely affected by the Director's determination may appeal the initial determination to the Associate Administrator as provided in §16.33." In accordance with 14 CFR, § 16.33(b) and (e), upon issuance of a Director's determination, "a party adversely affected by the Director's determination may file an appeal with the Associate Administrator within 30 days after the date of service of the initial determination;" however, "(i)f no appeal is filed within the time period specified in paragraph (b) of this section, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final because there is no administrative appeal is not judicially reviewable."

Title 14 CFR, § 16.247(a) defines procedural recourse for judicial review of the Associate Administrator's final decision and order, as provided in 49 U.S.C., § 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982, as amended, (AAIA), 49 U.S.C., § 47106(d) and 47111(d).

VI. ANALYSIS AND DISCUSSION

Respondent's Motion to Dismiss

On October 22, 2012, the Respondent filed a Motion to Dismiss the Complaint. [FAA Item 7] The Respondent, in support of its Motion to Dismiss the Complaint, stated "*because the Complainants have not met their burden of proof for any of their claims, each of their claims should be dismissed with prejudice.*" [FAA Item 7 page 18] The Director disagrees. The FAA originally investigated this matter under informal agency procedures and then accepted complainants' formal Part 16 complaint because the Complainants raised issues related to the Respondent's obligations under its Federal grant assurances to provide nondiscriminatory access. The Respondent claims it has not denied access and has treated the Complainants in the same manner as similarly situated lease holders. [FAA Item 7] The Motion to Dismiss is denied.

Informal Investigation and Findings

McDonough filed an Informal Complaint on December 19, 2007. [FAA Item 1 Exhibit 21] From 2008 until 2011, McDonough and the Respondent were engaged in negotiations to resolve the issues related to the proposed lease. The parties did not resolve their differences regarding

the term of the lease and the forfeiture clause. On July 22, 2011, the ADO responded without finding the Respondent in violation of its grant assurances; however the ADO did find the forfeiture clause contrary to FAA policy. The Respondent agreed to amend the forfeiture clause but declined to extend the offered five-year lease term. [FAA Item 1, Exhibit 27]

On March 23, 2012, McDonough filed a second Informal Complaint under 14 CFR, §13.1 against the Respondent. [FAA Item 1, Exhibit 46] On June 27, 2012, the ADO responded to the Part 13 Informal Complaint. Included in the response was a complete analysis of each grant assurance. The ADO concluded that *"... it does not appear the City of Wetumpka, owner of the Wetumpka Municipal Airport, is currently in conflict with its Federal obligations."* [FAA Item 1, Exhibit 52]

Issue 1

> **Whether the Respondent is in violation of Grant Assurance 5, *Preserving Rights and Powers* in failing to make the airport as self-sustaining as possible under the existing circumstance.**

Grant Assurance 5 requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. Additionally, it requires that the owner or sponsor of a federally obligated airport

> *"[...] will not take or permit any action which would operate to deprive it of any of the rights and powers necessary to perform any or all of the terms, conditions, and assurances in the grant agreement without the written approval of the Secretary, and will act promptly to acquire, extinguish or modify any outstanding rights or claims of right of others which would interfere with such performance by the sponsor."* [Grant Assurance 5]

The Complainants argue that "*Grant Assurance No. 5 has been and is being violated because the Respondent is failing in its power to make the airport as self-sustaining as possible under the existing circumstances*." They further argue that "*the Respondent's present actions will not sustain a viable and financial responsible airport but will deter responsible investors and tenants...*" [FAA Item 1, page 9]

The Respondent asserted that the Complainants failed to sufficiently plead Grant Assurance 5. The Respondent stated that "*Grant Assurance 5 does not, as the Complainants allege (at 9), concern the Airports financial health of 'mak[ing] the airport as self-sustaining as possible,' rather it concerns the steps that the City has taken to preserve its legal rights and powers to control Airport development and to comply with the Grant Assurance."* [FAA Item 7, page 41]

The Respondent maintained that it preserved its rights and powers by "*reserving the right to amend an inconsistent lease provisions to conform with the City's Federal obligations...the City retains power over the renewal and terms of the leases by subjecting leases to renegotiations on such terms as the 'City may fix' and by not including unilateral rights for options and renewals"* and *"the City's adoptions of the temporary policy of granting one-year leases intended to assist*

the City in preserving its legal powers for the future administration and growth of the Airport." [FAA Item 7, pages 41, 42]

The Respondent is contemplating expanding the airport, or in the alternative, possibly relocating the airport. In assessing the best options available for growth, the Respondent commissioned a Feasibility Study to determine if the airport can be expanded in its present location or if the airport should be relocated. To this end, the airport developed a new, standard lease with a one-year term. The purpose of the one-year lease was to put the airport users on notice that making improvements to hangars would not be economically advisable pending the outcome of the feasibility Study. The Respondent anticipates that the one-year term will be in effect for a period of three years.

Contrary to the Complainants' assertions, the Respondent's decision to limit the term of the lease was not an unreasonable approach to a possible impending change at the airport. The one-year lease puts the tenants on notice that the airport may be in transition and tenants should plan accordingly. Prior leases had a provision that required the tenants to get the approval of the Respondent prior to making capital improvements to their hangars. The current New Standard Lease has no provision that allows the tenants to make capital improvements on their hangars.

According to the language in Grant Assurance 5, the airport shall not take any actions that will deprive it of its rights and powers necessary to perform its Federal obligations. Using the logic of the Complainants, the Respondent would be required to grant long-term leases at the request of its tenants even when doing so would limit the power of the sponsor to manage the airport. *In Penobscot Air Service v. Knox County, FAA Docket No. 16-97-04 (September 25, 1997) (Director's Determination) (Penobscot),* the FAA stated: *"The purpose of the grant assurances is to protect the public interest in the operation of Federally obligated airports. The purpose is not to provide alternative or supplemental rights to those normally available to commercial tenants in disputes with their landlords, i.e. negotiation or commercial litigation under applicable state and local laws...."* [*Penobscot* at page 24; decision upheld on appeal, *Penobscot Air Service v. FAA, 164 F3d 713 (1st Cir., 1999)]*

The Complainants allegation that the Respondent failed to make the airport self-sustaining is not a persuasive argument to support a violation of Grant Assurance 5, *Preserving Rights and Powers*. Accordingly the Director does not find the Respondent in violation of Grant Assurance 5.

Issue 2

> **Whether the Respondent is in violation of Grant Assurance 8, *Consultation with Users,* in failing to allow adequate participation by airport users.**

Grant Assurance 8, Consultation with Users states that:

> *In making a decision to undertake any airport development project under Title 49, United States Code, it has undertaken reasonable consultations with affected parties using the airport at which project is proposed.*

The Complainants asserted a new allegation in its Complainant's Reply to the City's Answer, alleging that, "*the City never consulted the airport users as is required under Grant Assurance 8.*" They further stated that, *"[t]o suggest that the City's public City Council meetings provided adequate notice to users is without merit as evidenced by the Graver emails wherein the leases were approved by all parties behind closed doors and then implemented publically via City Ordinance 2011-15 in a matter of minutes."* [FAA Item 9, page 8]

The Respondent stated that Grant Assurance 8 is only applicable to airport developments projects funded under title 49, U.S.C. The Feasibility Study was funded by the Alabama Department of Transportation, not the FAA. [FAA Item 10, page 2]

Grant Assurance 8, *Consultation with Users*, applies to development projects under title 49, U.S.C. The Feasibility Study[4] was not federally funded and accordingly Grant Assurance 8 is not applicable. Even if Grant Assurance 8 applied, it does not obligate the airport sponsor to necessarily yield to the will of one or more airport tenants, it states the airport sponsor must undertake *"reasonable consultation with affected parties using the airport…"* However, the FAA encourages airport sponsors to conduct open and meaningful communications with its users.

A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the airport's land in a manner consistent with the public's interest. [*See Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica air Center v. City of Santa Monica,* FAA Docket No. 16-99-21 (February 4, 2003) (Final Decision and Order).] The airport, in exercising its propriety rights and powers limited the terms of all leases during the Feasibility Study.

Accordingly, under the specific facts this case, the Director finds that Grant Assurance 8 does not apply and the Respondent is not in violation of Grant Assurance 8, *Consultation with Users.*

Issue 3

> **Whether the Respondent is in violation of Grant Assurance 19, *Operation and Maintenance,* by failing to operate the Airport in a safe and serviceable condition in accordance with the Minimum Standards as are required by the FAA.**

Grant Assurance 19, *Operation and Maintenance,* states, in pertinent part, that:

> *The airport and all facilities which are necessary to serve the aeronautical users of the airport, other than facilities owned or controlled by the United States, shall be operated at all times in a safe and serviceable condition and in accordance with the minimum standards as may be required or prescribed by applicable Federal, state and local agencies for maintenance and operation. It will not cause or permit any activity or*

[4] The Feasibility Study is a multi-phase study that includes, among other things, evaluating the existing conditions of the Airport, defining requirements for future aeronautical facilities, and determining the ability to use Federal funds to expand the existing site of to relocate the Airport to a new greenfield site. [FAA Item 7 page 4]

action thereon which would interfere with its use for airport purposes. It will suitably operate and maintain the airport and all facilities thereon or connected therewith, with due regard to climatic and flood conditions. Any proposal to temporarily close the airport for non-aeronautical purposes must first be approved by the Secretary. In furtherance of this assurance, the sponsor will have in effect arrangements for-

> 1) Operating the airport's aeronautical facilities whenever required;
> 2) Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and
> 3) Promptly notifying airmen of any condition affecting aeronautical use of the airport. Nothing contained herein shall be construed to require that the airport be operated for aeronautical use during temporary periods when snow, flood or other climatic conditions interfere with such operation and maintenance. Further, nothing herein shall be construed as requiring the maintenance, repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor.

It will suitably operate and maintain noise compatibility program items that it owns or controls upon which Federal funds have been expended.

Grant Assurance 19, *Operation and Maintenance*, places the responsibility on the sponsor to operate and maintain the airport in a safe and serviceable condition and in accordance with reasonable minimum standards.

The Complainants alleged that "*Grant Assurance 19 has been and is being violated in that the Respondent is not operating the Airport in a serviceable condition in accordance with the minimum standards as are required by the FAA, to wit, the Respondent has not imposed minimum standards required by the Jackson ADO and the FAA requiring a reasonable lease term for hangar owners to protect their investment ...*". [FAA Item 1, page 11] This is the only reference to Grant Assurance 19 made by the Complainant.

The FAA expects the Respondent to meet its obligations under Grant Assurance 19, *Operation and Maintenance*. The FAA encourages airport management to establish minimum standards to be met by all who would engage in a commercial aeronautical activity at the airport. It is the prerogative of the airport owner to impose conditions on users of the airport to ensure its safe and efficient operation. Such conditions must be fair, equal, and not unjustly discriminatory. They must be relevant to the proposed activity, reasonably attainable, and uniformly applied. [*See* FAA Order 5190.6B, Sec. 3-12]

The FAA ordinarily makes an official determination regarding the reasonableness of the minimum standards only when the effect of a standard imposes unreasonable requirements on the users. If such a determination is requested, it is limited to an analysis as to whether failure to meet the qualifications of the standard is a reasonable basis for such denial of access or whether the standard results in an attempt to create an exclusive right. [*See* Order, Sec. 3-17(b) and AC 150/5190-7 *Minimum Standards for Commercial Aeronautical Activities.*]

While an airport sponsor may impose minimum standards on those engaged in aeronautical activities, an unreasonable requirement, or any requirement applied in an unjustly discriminatory manner, could constitute the grant of an exclusive right. [*See* FAA Order 5190.1B, Para. 11.c.]

The Respondent contended that Grant Assurance 19, "*concerns the Physical integrity of aeronautical facilities such as runways, taxiways and other parts of the public infrastructure used by aircraft.*" They further contended that "*None of the lease terms of which the Complainants object, however, deal with the physical condition of the Airport's public aeronautical faculties.*" [FAA Item 7, page 42]

The Complainants alleged that the new minimum standards requirement of the one year lease is a violation of Grant Assurance 19. According to the Respondent the FAA Jackson ADO was consulted prior to the adoption of the New Standard Lease. [FAA Item 7, page 4] The ADO stated that airport sponsors have wide latitude in operating their airports and it is acceptable to gradually make all tenants subject to the current minimum standards as their leases come up for renewal. [FAA Item 1, Exhibit 28]

The Complainants did not elaborate beyond the allegation that the airport is being operated in an unsafe manner nor did they articulate in what manner the Respondent is in violation of Grant Assurance 19. It is incorrect to apply Grant Assurance 19 to the length of a lease. Rather, this grant assurance requires the airport sponsor to maintain the airport and its facilities in a safe and serviceable condition.

Accordingly, the Director finds the facts presented in the record do not support a finding that the Respondent is in violation of Grant Assurance 19, *Operation and Maintenance*.

Issue 4

> **Whether the Respondent engaged in disparate treatment in violation of Grant Assurance 22, *Economic Nondiscrimination*, in implementing a New Standard Lease that only allowed a one year lease term.**

Grant Assurance 22, *Economic Nondiscrimination*, states in part,

> "*[the sponsor] will make the airport available as an airport for public use on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities, including commercial aeronautical activities offering services to the public at the airport.* [...] *Each fixed-base operator at the airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-base operators making the same or similar uses of such airport and utilizing the same or similar facilities.*" [Grant Assurance 22]

The Complainants alleged that the Respondent engaged in disparate treatment between airport users, resulting in economic discrimination. They claimed that the Respondent leased airport property to nonaeronautical users, specifically Arrowhead Plastics Engineering (Arrowhead) and The Pilot Center, Inc. operated by Bret Curenton (Curenton) with terms more favorable than

those given to the Complainants. [FAA Item 1, page 32, 33] To support this allegation the Complainant compared the renewal negotiations for McDonough to the renewal of the Arrowhead lease.

McDonough Lease

In 2002, the Respondent renewed the Complainant McDonough's lease for a five-year term. The lease had a provision for an additional, five-year term. [FAA Item 1, page 14] In 2007, McDonough attempted to again renew his lease with the Respondent for the second, five-year term. The Respondent presented McDonough with a new lease with a five-year, initial term with two, five-year renewals and a new forfeiture clause requiring the lessee to vacate the airport within fourteen days of a felony conviction of the lessee. McDonough objected to the lease, specifically the length of the terms and a forfeiture provision in the event of a felony conviction. McDonough requested an initial term of ten years. The Respondent refused to agree to the ten-year term. In December 2007, McDonough filed a Part 13 Informal Complaint with the FAA.

The Parties continued negotiations but were unable to resolve the two remaining issues. The FAA addressed the Part 13 Informal Complaint in July 2011, stating that it had hoped that the parties would have resolved the two remaining issues.[5] The letter, without a finding of a violation of the Respondent's obligations, also concluded that the forfeiture provision should be modified. [FAA Item 1, Exhibit 21]

On December 21, 2011, the Respondent informed McDonough that it had adopted a new Airport Minimum Standards Code and New Standard Lease for the Airport. Enclosed with the letter was a New Standard Lease with the one-year lease term and letter requesting payment of back rent.[6] The Respondent agreed to waive the 5 percent rent increase for 2012 for all of the tenants whose leases had expired or were due to expire in that year upon receipt of payment of the back rent and execution of the New Standard Lease. [FAA Item 1, Exhibit 29] McDonough hand delivered the requested amount to the Respondent the day after the request for payment was made but objected to the one year term in the new lease and did not executed the New Standard Lease. [FAA Item 1, page 16] As a result of McDonough's failure to sign the lease, the Respondent served a Notice to Vacate. [FAA Item 1, Exhibit 36]

Arrowhead and Curenton Lease

Arrowhead Plastics Engineering, Inc., assumed its lease effective July 6, 1989, and the lease was extended on October 5, 2009, for a period of five years set to expire on August 31, 2014. [FAA Item 7, page 7] The Curenton lease became effective on June 6, 2003, and will expire on June 15, 2013. [FAA Item 7, page 6 and Item 1, Exhibit 4] The Complainants alleged that the "*Respondent recently renewed Arrowhead's lease for a period of 5 years and it is believed that*

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[5] The Parties engaged in several months of negotiations from September 2007 to December 2007. The remaining unresolved issues in 2007 were the lease term; McDonough maintained his request for a 10- year initial term followed by two 5 year renewal, however the Airport offered an initial 5 year term followed by two 5 year renewals, and the forfeiture clause that required the lessee to vacate the airport within 14 days of any felony conviction. [FAA Item 1, pages 14, 15]

[6] McDonough continued to occupy the hangar during the lease negotiations and while awaiting a response from the FAA ADO and had not paid rent from the end of his lease in 2007. [FAA Item 1, page 15]

they still have one more five year renewable term available to them." The Complainants further stated that *"the present Arrowhead lease was signed at the time that the Respondent was requiring Complainants to accept a 1 year lease with no options for renewal and a reverter provision for any improvements."* The Complainants asserted that *"the Respondent may not give preferential treatment to Arrowhead, a nonaeronautical use tenant over the complain[ant]s who are exercising an aeronautical use."* [FAA Item 1, pages 32, 33]

The Respondent answered that "*Complainants base their argument on the inaccurate assertion that the Respondent had 'recently' offered Arrowhead and Curenton long-term leases."* The Respondent further provided that neither Arrowhead nor Curenton is similarly situated to the Complainants. The Respondent stated that the "*Arrowheads lease became effective on July 6, 1989, was extended on October 5, 2009, and is set to expire on August 31, 2014." It further stated that "Curenton's lease became effective on June 16, 2003 and is set to expire on June 15, 2013."* [FAA Item 7, page 34 and Item 7 Exhibit 9] The Respondent also argued that Arrowhead and Curenton are not similarly situated to the Complainants and that *"the City has not extended the Curenton or Arrowhead leases after it denied the same extension to the Complainants, and Complainants introduce no evidence showing otherwise."* [FAA Item 7, pages 34 and 35]

The Complainants contend that "*the City had blatantly discriminated against its hangar tenants by renewing Arrowhead's lease by City resolution on October 5, 2009, (see City's Exhibit 9) when it just the month before denied Complainant McDonald's request to exercise its five-year renewal option."* [FAA Item 7, pages 6 and 7] The Respondent acknowledges that Arrowhead is a nonaeronautical user but denies that they were treated more favorably. The Respondent states that Arrowhead is not similarly situated to the Complainants. First, Arrowhead is a nonaeronautical user not permitted to engage in aeronautical activities at the airport. Additionally, Arrowhead operates its facilities from leasehold that is separated from the airfield by a state highway and it has no airfield access. The Respondent states that *"In contrast, all the complainants have aeronautical privileges and have hangars with airfield access."* Additionally, even if Arrowhead and the Complainants were similarly situated, the Arrowhead lease was renewed for a five year term in 2009, expiring in August 2014. The Arrowhead lease was approved prior to the December 11, 2011, adoption of the New Standard Lease. [FAA Item 7, exhibit 9] It is also noteworthy that changes in the airport location will unlikely have the same effect on Arrowhead and Curenton because their businesses do not require airfield access.

The Complainants cite *U.S. Construction Corp. v Respondent of Pompano Beach, FAA Docket 16-00-14 (July 10, 2002) (Final Agency Decision), aff'd, City of Pompano Beach v. FAA, 774 F.2d 1529 (11th Cir. 1985)* as support for their contention that the Respondent is in violation of its grant assurance obligation. The Complainants argue that the one year lease term is inconsistent with the airports obligation under the grant assurance. In *Pompano,* the lease was the standard lease with a two-year term. The Airport in *Pompano* did not articulate a business purpose for the limited lease term. In *Pompano,* the FAA found that the airport sponsor was in violation of its grant assurance for failure to grant long term leases. The facts in *Pompano* can be distinguished from the present set of facts because the Respondent in this complaint has articulated a legitimate business purpose to support its decision to limit lease terms to one-year and no tenants were offered longer term leases than the Complainants.

The record confirmed that the current Arrowhead lease was renewed prior to the adoption of the New Standard Lease; accordingly, Arrowhead was not treated more favorably than the Complainants. [FAA Item 7, page 34] The record also confirmed that the Curenton lease became effective in 2003 and is set to expire in June 2013; accordingly the Curenton lease remains unexpired and not subject to the New Standard Lease. The Complainant McDonough requested a 10-year initial lease term in 2007 and the Respondent offered a five-year lease term that was declined. [FAA Item 1, page 14] No other user was granted a ten-year lease term.

The fact that Arrowhead and Curenton do not have airfield use or access could mean that they would not be impacted in the same manner as aeronautical users if the airport were relocated. Arrowhead and Curenton are not similarly situated to the Complainants. The record does not support the assertion that the nonaeronautical users were treated more favorably.

Proposed Lease Clause

The Complainants also raised the issue of the disposition clause of the New Standard Lease. The disposition clause governs the ownership of improvements at the Airport after a lease expires. [FAA Item 7, page 7 and Exhibit 8] The Complainants' contend that the disposition clause in the New Standard Lease makes it "*patently unfair for the Respondent to be able to take the tenants' modifications and improvements after only a year when tenants have been unable to capitalize or depreciate the modifications or improvements over a period of time.*" [FAA Item 1, page 28]

From the record it appears that the Disposition of Improvements clause in leases offered by the Respondent has remained substantially the same since 1989. The language remains virtually unchanged; however, the time frame for removal of buildings or improvements varies from 60 days in 2007 to 120 days in the New Standard Lease. In previous lease agreements, the lessee was required to receive written consent from the Respondent prior to any construction or building. [FAA Item 7, Exhibit 9, and Item 1 Exhibit 3] Specifically the lease clause provided that "*lessee shall not have the right to construct any building or facility on said property without first obtaining the written consent of the Lessor thereto.*" [FAA Item 7, Exhibit 10]

The disposition clause in the New Standard Lease applies to all renewing tenants and it does not have a provision allowing for improvements and construction. The Respondent stated that the purpose of the disposition clause in the New Standard Lease is to discourage the tenants from making costly improvements when they may not be able to fully depreciate the value of the improvements. The Respondent also indicated that it "*intends to maintain the new leasing policy for approximately three years, the term of the Feasibility Study period.*" [FAA Item 7, Exhibit 3] The Respondent (by letter to the FAA Airports District Office, dated May 22, 2012), explained the disposition clause stating that "*under the new standard lease all existing structures built by the commercial operators prior to 2012 were grandfathered in and would remain the personal property of the Lessee but any new construction would revert to the Respondent upon termination or expiration of the leases.*" The Respondent stated that for many years there had been no new construction at the Airport and is unaware of any planned improvements to hangars. [FAA Item 1, Exhibit 51]

The purpose of the one-year term is to discourage improvements during the study period and the lease has no provision that allows the lessee to request approval for improvements. The Respondent's intent is that no improvements will be approved during the time frame of the Feasibility Study. The disposition clause provides that "*Upon expiration of this Lease, any improvements made by the Lessee in a NEW or EXTENDED contract after the date of January 1, 2012, will revert to the City of Wetumpka upon expiration of the lease.*" [FAA Item 7, Exhibit 10] This clause specifically excludes improvements made prior to January 1, 2012, from the disposition provision and gives the Lessee 120 days to remove any and all prior improvements on the premises. [FAA Item 7, Exhibit 10]

The Respondent articulated a reasonable basis for the disposition clause citing that it applies to every renewing tenant. The New Standard Lease puts all lessees on notice that making capital improvements may not be prudent given the uncertain future of the airport. The record supports the Respondent's claim that all tenants, upon expiration of their current lease, are being required to sign the New Standard Lease with the one year lease provision. The record also indicates that since the adoption of the New Standard Lease, all tenants with expired leases have signed the New Standard Lease, except the holdover Complainants. The Respondent cited the reasonable justification of the Feasibility Study for offering only a one year lease and the disposition clause.

The Director finds that the facts do not support the Complainants' claim of economic discrimination. The record indicates that the Respondent has not offered any tenant a lease with a term longer than one year after it adopted the New Standard Lease in 2011. No Complainant has provided evidence to support an argument that a recent improvement is being impacted by a short term lease. There is no evidence in the record that supports the proposition that the Respondent treated any tenants more favorably than the Complainants.

Accordingly, the Director finds that the Respondent did not engage in economic discrimination or subject the Complainants to unjust discrimination and is not in violation of Grant Assurance 22.

Issue 5

> **Whether the Respondent's is in violation of Grant Assurance 23, *Exclusive Rights*, 49 U.S.C., § 40103(e) and 49 U.S.C., § 47107(a)(4), in allowing tenants Arrowhead and Curenton to retain a long term lease while denying that right to Complainants.**

Grant Assurance 23, Exclusive Rights, implements the provisions of 49 U.S.C., §§ 40103(e) and 47107(a)(4), and requires, in pertinent part, that the owner or sponsor of a federally obligated airport:

> *...will permit no exclusive right for the use of the airport by any persons providing, or intending to provide, aeronautical services to the public.*

> *...will not, either directly or indirectly, grant or permit any person, firm, or corporation, the exclusive right at the airport to conduct any aeronautical activities...*

The Complainants argue that the Respondent is in violation of Grant Assurance 23, *Exclusive Rights,* in "*conferring exclusive rights on Arrowhead and Curenton by allowing them to retain a long term lease but denying that right to the Complainants.*"

The Complainants' contention that Arrowhead and Curenton were offered longer leases than the Complainants has been fully analyzed in Issue 4 above. As explained in the analysis of Grant Assurance 22, this assertion by the Complainants is not supported by the facts in the record, specifically no other tenants, aeronautical or nonaeronautical, were offered longer term leases than the Complainants.

The FAA will not normally find the airport sponsor in violation of Grant Assurance 23, *Exclusive Rights*, where the complainant does not show the airport sponsor granted to another entity the exclusive right to conduct a particular aeronautical activity or to provide a particular aeronautical service on the Airport. *Asheville Jet, Inc. d/b/a Million Air Asheville v Asheville Regional Airport Authority; City of Asheville, North Carolina; and Buncombe County, FAA Docket No. 16-08-02, (Director's Determination*).

Accordingly, the Director finds the Respondent is not currently in violation of Grant Assurance 23, *Exclusive Rights,* because the record does not support that Arrowhead and Curenton were offered longer term leases than the Complainants, thus no exclusive rights were conferred on those parties.

Issue 6

> **Whether the Respondent is in violation of Grant Assurance 24, *Fee and Rental Structure* in implementing a short term lease structure.**

Grant Assurance 24 states in pertinent part that an airport,

> *... will maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection. No part of the Federal share of an airport development, airport planning or noise compatibility project for which a grant is made under Title 49, United States Code, the Airport and Airway Improvement Act of 1982, the Federal Airport Act or the Airport and Airway Development Act of 1970 shall be included in the rate basis in establishing fees, rates, and charges for users of that airport.*

Grant Assurance 24, *Fee and Rental Structure*, obligates the airport to establish a fee and rental structure that will make the airport as self-sustaining as possible under the particular circumstances at that airport. FAA's *Policy and Procedures Concerning the Use of Airport Revenue*, 64 FR 7696 (February 16, 1999) (*Revenue Use Policy*), covers the policies and procedures on the requirements for a self-sustaining airport rate structure.

The Complainants contend that the Respondent is in violation of Grant Assurance 24 because it is failing to provide a rental structure with a long-term lease to tenants who have invested substantial money in constructing and maintaining hangars. Complainants further contend that the Respondent is failing to make the airport as self-sustaining as possible. This assertion is based on the fact that the Respondent adopted a New Standard Lease with a one-year term.

The Complainants do not argue that the Respondent has established fees and rents that are inconsistent with the *Revenue Use Policy*. Nor do Complainants allege that the fees and rents charged to Complainants are unfair or unreasonable. Rather, Complainants argue that the one-year leases will impair the Respondent's ability to make the airport self-sustaining. Complainants McDonough, Tri-D and M & R argue that the short term lease prohibited them from obtaining loans to make improvements on their hangers. They supported that contention by providing letters from their financial institutions. [FAA Item 1, Exhibits 65, 67]

From the record it appears that the Complainants made an inquiry regarding the availability of loans rather than submitting actual applications for a loan. [FAA Item 1, page 17, Exhibit 65] It is also significant that each inquiry was made after they were informed of the Feasibility Study and the possibility of relocating the Airport and requested to sign the New Standard Lease. The Respondent stated that it had not been informed of plans by any tenants to make capital improvement to any hangars. The Respondent further stated that there had not been any major construction at the Airport for many years. [FAA Item 7, page 15]

The Respondent justifies the one-year lease term based on its business decision to explore the expansion of the airport or its relocation by conducting a Feasibility Study. The Respondent stated that the current rental rates are similar to that of other airports in the area and that the standard lease rates and terms apply to all new leases and lease extensions entered into after January 1, 2011. [FAA Item 7, page 31] The Respondent further stated that the one-year lease is a temporary policy based on a business decision designed to streamline its tenants' leases to allow it to further develop the airport. [FAA Item 7, page 32]

In this case, the Complainants' concern appear to have less to do with the self-sustainability of the airport and more to do with their desire for long term leases and maintaining the current status of the Airport. The Complainants have not provided any information to support its contention that the Respondent's New Standard Lease has impaired the Airport's ability to be self-sustaining. To the contrary, it appears from the record that all tenants at the Airport with leases due for renewal, except for the Complainants, have signed the new one-year lease. [FAA Item 1, Exhibit 59]

While the Complainants may not agree with the Respondent's decision to offer one-year leases to all tenants when their current leases expire, the airport owners retain the propriety right to make such decisions. A sponsor is not required to develop any and all parcels of land in a manner consistent with the wishes of any one party, but rather may exercise its proprietary rights and powers to develop and administer the airport's land in a manner consistent with the public's interest. *Santa Monica Airport Association, Krueger Aviation, Inc. and Santa Monica air Center v. City of Santa Monica, FAA Docket No. 16-99-21 (February 4, 2003) (Final Decision and Order)* The FAA does not normally intervene in the business decisions of the airport sponsors

where grant assurance violations are not at issue. *See Jet 1 Center, Inc. v. Naples Airport Authority, FAA Docket No. 16-04-03, (January 4, 2005) (Director's Determination)*; and also *M. Daniel Carey and Cliff Davenport v. Afton-Lincoln County Municipal Airport Joint Powers Board, FAA Docket No. 16-06-06, (January 19, 2007) (Director's Determination).*

The administrative record does not contain any evidence that the Respondent's business decision is impacting the airport's ability to be self-sustaining. While Complainants may disagree with the financial business decisions of the Respondent regarding the development of the Airport, the Respondent has the proprietary right to make such decisions. It may be appropriate for the Respondent to decline to enter into a long term lease with a tenant for an area slated for redevelopment. The Respondent offered a business decision as support for the lease term. See *In Thermco Aviation, Inc. and A-26 Company v. City of Los Angeles, Los Angeles Board of Airport Commissioners, and Los Angeles World Airports, FAA Docket No. 16-06-07 (June 21, 2007) (Director's Determination).*

Accordingly, the Director finds the Respondent is not in violation of Grant Assurance 24, *Fee and Rental Structure*, as a result of the New Standard Lease with a one year term.

Issue 7

> **Whether the Respondent is in violation of Grant Assurance 38, *Hangar Construction*, U.S.C., § 47107(a)(21) in refusing to grant long-term leases.**

Grant Assurance 38 states,

> *If the airport owner or operator and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the aircraft owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long term lease that is subject to such terms and conditions on the hangar as the airport owner or operator may impose.*

The Complainants argued that Grant Assurance 38 should be interpreted broadly to include any improvements made to a hangar even without the knowledge and consent of the airport sponsor. [FAA Item 1, page 38] The Complainants stated that "*it is important to keep in mind that the large hangar owner's at the Airport have all owned hangars on the airfield for decades.*" [FAA Item 1, page 37] They further argued that the Complainants should be granted long term leases to amortize substantial improvements and modifications in compliance with the grant assurance. [FAA Item 1, page 38]

This interpretation of the grant assurance would be a violation of the sponsor's rights and powers. The Respondent retained the right to approve any improvements to hangars on the airport, in part, based on the long term planning for the airport. To adopt the position of the Complainants would allow the tenant to dictate the management of the Airport by making improvements to a hangar that would then require the Airport to grant a long term lease to the tenant.

Federal Grant Assurance No. 5, *Preserving Rights and Powers*, requires the airport owner or sponsor to retain all rights and powers necessary to ensure the continued operation of the airport consistent with its Federal obligations. Under this assurance, an airport sponsor may not take or permit any action that would dilute its power to operate and manage the airport, including development of the airport, consistent with its Federal obligations. *See Jim Martyn v. Anacortes FAA Docket 16-02-03 {(April 14, 2003)(Director Determination).*

The Respondent stated that the "*Complainants' claim that the City is in violation of Grant Assurance 38 because the City will not offer leases with terms long enough to amortize hanger repairs and other improvements that the Complainants wish to make*". [FAA Item 7, page 39] The Respondent stated that the three Complainants operate from hangars that were built years ago and the Respondent had no knowledge of any hangar construction that had taken place in the past few years. The Respondent further contended that "*The obligations imposed by Grant Assurance 38 are straightforward: if the airport sponsor and a person who owns an aircraft agree that the aircraft owner is to construct a hangar at his or own expense, the sponsor must grant a lease upon terms and condition that the sponsor may impose*." The Respondent stated that it was not aware of any request for the construction of a new hangar from anyone at the airport. [FAA Item 7, page 40]

Complainants McDonough, Barnett and M & R Holdings made loan inquiries at financial institutions for improvements on their hangars. It appears from the record that they did not submit actual loan applications but made an inquiry about the possibility of a loan. [FAA Item 1, Exhibits 65, 67]

The Complainants' attempt to support their claim that the short term lease violates Grant Assurance 38, by citing the loan inquiries as justification is not persuasive. Complainants' argument disregards the actual wording in the grant assurance and its plain meaning. Grant Assurance 38 applies to an agreement between the Airport and the aircraft owner for the construction of a hangar. Under the facts in this complaint, no such agreements exist. To the contrary, the current lease has no provision that allows capital improvements to be made to any hangar. The Respondent put all tenants on notice that it would not be prudent to make capital improvements to their hangars pending the result of the Feasibility Study and reinforced this by including a provision in the lease that all improvements made after January 1, 2012, would revert to the Airport.

Grant Assurance 38, *Hangar Construction,* provides that if the airport owner or operator and a person who owns an aircraft agree that a hangar is to be constructed at the airport for the aircraft at the owner's expense, the airport owner or operator will grant to the aircraft owner for the hangar a long term lease. No such agreement existed between the Respondent and the Complainants and the Respondent advised hangar owners that improvements would not be economically advisable.

The record does not support the assertion that the Complainants made capital improvements on their hangars. It is clear from the record that the Respondent is not aware of any such improvements and was not asked to approve any modification or improvements to any hangars at the Airport.

The FAA encourages airport sponsors to grow the airport by offering long term leases that will encourage new construction. However, the Respondent has articulated a reasonable business plan to support the one year term and has a proposed three year time limit on the one year lease term.

Accordingly, the Director finds the Respondent is not currently in violation of Grant Assurance 38, *Hangar Construction,* as a result of imposing the New Standard Lease.

Findings and Conclusions

Upon consideration of the submissions of the parties, the entire record herein, the applicable law and policy and for the reasons stated above, the Director, Airport Compliance and Management Analysis, finds and concludes:

- The Respondent's standard lease with short term lease provisions for hangars at the Wetumpka Municipal Airport does not constitute a violation of Grant Assurance 5, *Preserving Rights and Powers,* and the lease term does not deprive the Respondent of its rights and powers necessary to operate the airport.

- The Respondent is not in violation of Grant Assurance 19, *Operation and Maintenance,* because the minimum standards do not require the Respondent to offer a long term lease.

- The Respondent is not in violation of Grant Assurance 8, *Consultation with Users,* because Grant Assurance 8 is only applicable to projects funded under title 49, U.S.C.

- The Respondent is not in violation of Grant Assurance 22, *Economic Nondiscrimination;* the standard lease terms provided for a one-year lease term to allow the Airport the assess its future needs.

- The Respondent's refusal to grant long term leases for hangars at the Wetumpka Municipal Airport is not a constructive granting of an exclusive right in violation of Grant Assurance 23, *Exclusive Rights*, 49 U.S.C., § 40103(e) and 49 U.S.C., § 47107(a)(4). The record refutes the assertion that other tenants are being treated more favorably thereby creating an exclusive right.

- The Respondent's current fee and rental structure is not in violation of Grant Assurance 24, *Fee and Rental Structure,* based on the short term lease. The record does not support that the short term lease is causing the airport to fail to be self-sustaining.

- The Respondent's refusal to grant long term lease is not a violation of Grant Assurance 38, *Hangar Construction*, U.S.C., §47107(a)(21).

ORDER

ACCORDINGLY, the Director finds that the Respondent of Wetumpka is not in violation of Federal law and the Federal grant obligations.

All Motions not expressly granted in this Determination are denied.

RIGHT OF APPEAL

This Director's Determination is an initial agency determination and does not constitute final agency action and order subject to judicial review. [14 CFR, 16.247(b)(2)] A party to this Complaint adversely affected by the Director's Determination may appeal the initial determination to the FAA Associate Administrator for Airports pursuant to 14 CFR, 16.33(b) within thirty (30) days after service of the Director's Determination.

Randall S. Fiertz
Director, Office of Airport Compliance
and Management Analysis

10/10/13
Date